TYE TEN PHIN

v.

MENTERI HAL EHWAL DALAM NEGERI, MALAYSIA & ORS.

HIGH COURT MALAYA, JOHOR BAHRU
ABU MANSOR ALI J
[CRIMINAL APPLICATION NO. 54-2 OF 1988]
17 NOVEMBER 1988

ADMINISTRATIVE LAW: *Writ of habeas corpus - Applicant detained under Emergency (Public Order and Prevention of Crime Ordinance) 1969 and later under Dangerous Drugs (Special Preventive Measures) Act 1985 - Whether amendments to the Ordinance and Act had validated any invalid orders and whether retrospectively.*

CONSTITUTIONAL LAW: *Preventive detention - Amendments made to Emergency (Public Order and Prevention of Crime Ordinance) 1969 and Dangerous Drugs (Special Preventive Measures) Act 1985 - Whether amendments offended Article 7(1) of the Federal Constitution.*

The applicant was first arrested under s. 3 of the Emergency (Public Order and Prevention of Crime Ordinance) 1969 ("the Ordinance") on 9 March 1985 and was detained by Kuala Lumpur Police till 9 May 1985 ("1st arrest"). A detention order was issued under s. 4(1) the Ordinance dated 3 May 1985 whereby applicant was to be detained from 7 May 1985 at Pusat Pemulihan Akhlak, Muar for a period of two (2) years ("1st detention order"). Applicant was admitted to Pusat Pemulihan Akhlak, Muar only on 9 May 1985.

Applicant was released on 6 May 1987 but was again rearrested outside Pusat Pemulihan Akhlak, Muar and taken to Muar Police Station ("2nd arrest"). The 2nd arrest was made pursuant to s. 3(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ("the Act"). A second detention order under s. 6(1) of the Act ordered that applicant be detained for a period of two years. ("2nd detention order"). The 2nd detention order stated clearly that the applicant was to be detained for a period of two years at Pusat Pemulihan Akhlak, Muar with effect from 4 July 1987. Applicant was escorted from Muar police station and admitted to Pusat Pemulihan Akhlak, Muar to be detained under the 2nd detention order only on 5 July 1987.

The applicant applied for a writ of *habeas corpus* on the grounds that in respect of the 1st detention order, the applicant's initial detention in Kuala Lumpur by the police from 7 May 1985 to 9 May 1985 was unauthorised and illegal as it violated s. 4(2) of the Ordinance, and as such was not in accordance with law as guaranteed under Article 5(1) of the Constitution and that the applicant was not in lawful custody from 7 May 1985 to 9 May 1987. In respect of the 2nd detention order, it was argued that the applicant's detention at the Muar police station from 4 July 1987 to 5 July 1987 was unauthorised and illegal in that it violated s. 6(2) of the Act and was not in accordance with law as guaranteed under Article 5(1) of the Constitution and that applicant was not in lawful custody from 4 July 1987 to 5 July 1987.

The respondent replied that in respect of the 1st detention order since the applicant was duly released on 6 May 1987 whatever complaint he may have is not one of *habeas corpus*. It was also submitted that the 1st detention order is clearly lawful in the light of the amendment to the Ordinance by virtue of Act 706 coming into force on 15 July 1988 which created the new s. 4C and also s. 7 of the Amendment Act A 706 which such validating is to have retrospective effect.

In respect of the 2nd detention order, the respondent also submitted that by virtue of the amendment made to the Act by Act A 707 also with effect from 15 July 1988 creating the new s. 6A and also by virtue of s. 4 of Act A 707, the 2nd detention order was made a valid order.

Counsel for the applicant however agreed that no provision has been made in the amending Act to make it retrospective and the amendment is contrary to and forbidden by Article 7(1) of the Federal Constitution.

Held:

[1] Section 4C and s. 7 of the Act A 706 are too clear to admit any ambiguity or doubt as to the intention of Parliament. By the new s. 4C of the said Act A 706 the 1st detention order sought to be impugned is validated. By the terms of s. 7, it is made retrospective covering all detention orders made between the coming into force of the Ordinance and the passing of the new Act A 706.

[2] The amending Act A 706 does not offend Article 7(1) of the Federal Constitution as it did not create an offence but regulated a procedure which says that the period of detention called the transitional period and the detention period covering the journey of the applicant to and from his place of detention is valid. Therefore the 1st detention order of the applicant has been validated by Act A 706.

[3] Similarly, the new s. 6A of the Act A 707 has validated the period of detention by the police in Muar police station and by virtue of s. 4 of Act A 707 the Act operated retrospectively to make the 2nd detention order a valid order. Therefore the 2nd detention order is a valid order.

[Application dismissed.]

Cases referred to:

Re Tan Boon Liat [1977] 2 MLJ 108
Koh Yoke Koon v. Minister for Home Affairs Malaysia & Anor. [1988] 1 MLJ 45
PP v. Koh Yoke Koon [1988] 1 CLJ (Rep) 269
PP v. Datuk Haji Harun bin Haji Idris [1977] 1 MLJ 14

Legislation referred to:

Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 2, 3(1), 4, 6(1), (2), 7, (2), 6A
Emergency (Public Order and Prevention of Crime)Ordinance 1969, ss. 3, (3), 4(1), 4C, 6(1)
Federal Constitution, art. 5(1), 7(1)

For the applicant - Teh Poh Teik; M/s. Abdul Raman Saad & Associates
For the respondents - Md. Raus bin Sharif; Senior Federal Counsel

JUDGMENT

Abu Mansor Ali J:

By the criminal application no. 2 of 1988, the applicant applies that a writ of *habeas corpus ad subjiciendum* be issued. His application is supported by an affidavit of his wife Madam Lim Ah Sim sworn 3 September 1988. In her affidavit in para. 10 and para. 11 she cited her grounds in the following terms:

> 10. I have been verily advised that the 1st detention order and the 2nd detention order are bad, illegal and unlawful and consequently the continued detention of the applicant is also bad, illegal and unlawful. The continued detention of the applicant is bad, illegal and unlawful on the following grounds:

(a) that in respect of the 1st detention order:

(i) that the applicant's initial detention in Kuala Lumpur by the police from 7 May 1985 to 9 May 1985 was unauthorised and illegal in that it violated s. 4(2) of the Ordinance;

(ii) that the applicant's initial detention in Kuala Lumpur by the police from 7 May 1985 to 9 May 1985 was not in accordance with law as guaranteed under Article 5(1) of the Constitution;

(iii) that applicant was not in lawful custody from 7 May 1985 to 9 May 1985 and the applicant ought not to be detained under the 1st detention order and thereafter to be continued to be so detained.

(b) that in respect of the 2nd detention order.

(i) that the applicant's detention at the Muar Police Station from 4 July 1987 to 5 July 1987 was unauthorised and illegal in that it violated s. 6(2) of the said Act;

(ii) that the applicant's detention at the Muar Police Station from 4 July 1987 to 5 July 1987 was not in accordance with law as guaranteed under Article 5(1) of the Constitution.

(iii) that the applicant was not in lawful custody from 4 July 1987 to 5 July 1987 and the applicant ought not to be continued to be so detained.

11. I have been advised and verily believe that the respondents are acting contrary to law in detaining/ordering and/or sanctioning the detention of the applicant at Pusat Pemulihan Akhlak, Muar.

In her para. 12 she prayed that the Court do issue the writ she prayed for.

The undisputed facts of this matter are as follows:

Brief Facts

(a) Applicant was first arrested on 9 March 1985 and was detained by Kuala Lumpur Police till 9 May 1985 (hereinafter called "the 1st arrest").

(b) Applicant was arrested under s. 3 of the Emergency (Public Order and Prevention of Crime Ordinance) 1969 (hereinafter called "the Ordinance").

(c) Detention order was issued under s. 4(1) of the Ordinance dated 3 May 1985 by 1st respondent whereby applicant was to be detained from 7 May 1985 at Pusat Pemulihan Akhlak, Muar for a period of two (2) years (hereinafter called "1st detention order"). See Exhibit "LAS1" in affidavit of Lim Ah Sim.

(d) Application was admitted to Pusat Pemulihan Akhlak Muar only on 9 May 1985 although 1st detention order states applicant was to be detained at Pusat Pemulihan Akhlak, Muar from 7 May 1985.

(e) Applicant was released on 6 May 1987 but was again re-arrested outside Pusat Pemulihan Akhlak, Muar and taken to Muar police station (hereinafter called "the 2nd arrest").

(f) The 2nd arrest was made pursuant to s. 3(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 (hereinafter called "the Act").

(g) A second detention order under s. 6(1) of the Act was signed by 1st respondent and ordered that applicant be detained for a period of two (2) years (hereinafter called "the 2nd detention order").

(h) 2nd detention order was served on applicant on 4 July 1987.

(i) 2nd detention order states clearly that applicant be detained for a period of two (2) years at Pusat Pemulihan Akhlak, Muar with effect from 4 July 1987. See Exhibit "LAS3" in the affidavit of Lim Ah Sim.

(j) Applicant was escorted from Muar police station and admitted to Pusat Pemulihan Akhlak, Muar to be detained under the 2nd detention order only on 5 July 1987.

In *Public Prosecutor v. Karpal Singh s/o Ram Singh* Supreme Court Criminal Appeal No. 2 of 1988 the Supreme Court at p. 8 of the judgment said:

> ...whilst the grounds of detention stated in the detention order are open to challenge or judicial review if alleged to be not within the scope of the enabling legislation the allegations of fact upon which the subjective satisfaction of the Minister was based are not.

In respect of 1st detention order LAS1 dated 3 May 1985 wherein the applicant was directed by the Minister to be detained at the Pusat Pemulihan Akhlak, Muar with effect from 7 May 1985, it is the applicant's contention that the initial detention in Kuala Lumpur by the police from 7 May 1985 to 9 May 1985 was unauthorised and illegal in that it violated s. 4(2) of the Emergency (Public Order and Prevention of Crime Ordinance) 1969 (Ordinance). This gap of two days before the applicant was put in the Pusat Pemulihan Muar, Counsel submitted violated s. 4(2) of the Ordinance which reads:

> Every person detained in pursuance of a detention order shall be detained in such place as the Minister may direct and in accordance with instructions issued by the Minister and any rules made under sub-section (3).

Counsel further submitted that must be strict compliance with the Minister's order. He was to be detained at no other place, other than according to the order, he contends.

Applicant's Counsel went on to contend that since the applicant's initial detention in Kuala Lumpur from 7 May 1985 to 9 May 1985 was illegal, his detention was also not in accordance with Article 5(1) of the Federal Constitution which reads:

> 5. Liberty of the person.
>
> (1) No person shall be deprived of his life or personal liberty save accordance with law.

The applicant's counsel submitted consequentially since the applicant was not in lawful custody from 7 May 1985 to 9 May 1985 he therefore ought not to be detained under the 1st detention order and thereafter the respondent should not continue to so detained him.

Then as regards the 2nd detention order dated 3 July 1987 LAS3 attached to encl. (2) similarly it is applicant's Counsel's contention that the applicant's detention at the Muar Police Station from 4 July 1987 to 5 July 1987 was also unauthorised and illegal in that it violated s. 6(2) of the Dangerous Drugs (Special Preventive Measures) Act 1985 (the Act). Section 6(2) of the Act reads:

> Every person detained in pursuance of a detention order shall be detained in such place (hereinafter referred to as a "place of detention") as the Minister may direct in accordance with any instructions issued by the Minister and any regulations made under s. 22.

Similarly the applicant's Counsel contended that since the said detention in Muar Police Station violated s. 6(2) of the Act, his detention therefore was not in accordance with law and it in turn violated Article 5(1) of the Constitution. In this connection, Counsel submitted

that the words "in accordance with law" in Article 5(1) of the Constitution includes procedural law. He cited *Re Tan Boon Liat* [1977] 2 MLJ 108, 114 for the proposition that the terms of a detention order has to be strictly compiled with.

From the applicant's Counsel's argument clearly the first issue that must be resolved is whether the detention of the applicant under the 1st detention order was in each case illegal in view of the unauthorised detention in both cases as submitted by applicant's Counsel. Applicant says the unauthorised detention has that effect and he cited the case *Koh Yoke Koon v. Minister for Home Affairs, Malaysia & Anor.* [1988] 1 MLJ 45 where my brother Edgar Joseph Jr. J considered the period of unauthorised detention as violating the provision of the Ordinance and also consequently violated Article 5(1) of the Constitution. Counsel submitted that the Supreme Court in *Public Prosecutor v. Koh Yoke Koon* [1988] 1 CLJ (Rep) 269 confirmed the Judge's judgment.

In anticipation of the learned Senior Federal Counsel's submission the applicant the applicant's Counsel concede that because of this decision, Parliament had amended the Act by virtue of Act A 707 wef 15 July 1988 but Counsel contended that the amendment has not affected the decision in *Public Prosecutor v. Koh Yoke Koon* [1988] 1 CLJ (Rep) 269 for two reasons (i) no provision has been made in the amendment Act to make it retrospective and (ii) the amendment was contrary to and forbidden by Article 7(1) of the Federal Constitution.

Counsel also went to cite the several authorities that the applicant is entitled to take a technical defect in his application for writ of *habeas corpus*. *Re Tan Boon Liat* [1977] 2 MLJ 108 and he also cited the already settled law that in cases affecting the liberty of subject the provision must be strictly construed and when in doubt it should be resolved in favour of this subject.

The Senior Federal Counsel for the respondent replied that as the 1st order of detention under s. 4(1) of the Ordinance is concerned the applicant is not longer subject to that order since he was duly released on 6 May 1987. He referred to para. 4 of encl. 8 the affidavit of En. Hassan and the affidavit of ASP Razali, encl. 5 para. 2nd he submitted further that whatever complaint applicant may now have since he had been released is not *habeas corpus.* If his complaint is that his detention was illegal then his remedy is elsewhere.

Be that as it may the learned Senior Federal Counsel submitted that the 1st detention order is clearly lawful in the light of the amendment to the Ordinance by virtue of Act A 706 coming into force on 15 July 1988. The 1st order is valid as s. 3 creating the new s. 4C provides:

> No detention order shall be invalid or inoperative by reason:
>
> (a) that the person to whom it relates:
>
> (i) was immediately after the making of the detention order detained in any place other than a place of detention direction by the Minister under s. 4(2) (hereinafter in this section referred to as "the place of detention");
>
> (ii) continued to be detained immediately after the making of the detention order in the place in which was detained under s. 3 before his removal to the place of detention, notwithstanding that the maximum period of such detention under s. 3(3) had expired; or
>
> (iii) was during the duration of the detention order on journey in police custody or any other custody to be the place of detention; or

(b) that the detention order was served on him at any place other than the place of detention, or that there was any defect relating to its service upon him.

Then under s. 7 of amendment Act A 706 such validating is to have retrospective effect for s. 7 reads:

> Where a detention order was made under s. 4(1) of the Ordinance against any person during the period between the dated of the commencement of the Ordinance and the commencement of this Act (hereinafter referred to as "the transitional period"), the detention order and the detention effected in pursuance thereof during the transitional period, and its continuation thereafter, if any, are hereby declared lawful and valid, and shall be deemed to be, and to have always and at all times been, lawful and valid, notwithstanding that at any time during the duration of the detention order he was detained at any place other than the place directed by the Minister under s. 4(2) of the Ordinance (hereafter referred to as "the place of detention"), or continued to be detained in the place in which he was detained under s. 3 of the Ordinance after the expiry of the maximum period provided therefor under s. 3(3) of the Ordinance, or was on journey in police custody or any other custody to the place of detention, or that there was any delay in the service of the detention order on him, or that it was served on him at any place other than the place of detention, or that there was any defect relating to its service upon him.
>
> (2) No action, suit, prosecution or other legal proceeding whatsoever of any description or in any form, shall be brought, instituted or maintained in any Court on any ground after the commencement of this Act, or, if brought or instituted before the commencement of this Act, shall continued to be maintained, for or on account of, or in respect of, anything lawfully done in relation to the detention order or the detention declared lawful and valid under subsection (1), save that the provisions of this subsection shall not apply to any such legal proceeding which had concluded and the final decision of the Court in respect of which had been given before the commencement of this Act or to any appeal in respect of such final decision."

The learned Senior Federal Counsel submitted in view of the amendment it has the effect of validating any invalid orders and by virtue of s. 7(2) of the Act A 706 no action shall be maintained. Respondents' Counsel also cited *Public Prosecutor v. Datuk Haji Harun bin Haji Idris* [1977] 1 MLJ 14 as to how an amendment of a statute of this nature is to be viewed.

After reading the new s. 4C and s. 7 of the Act A 706, I am with the learned Senior Federal Counsel that the effect of each was clearly to cure the lacuna created by the decision of the Supreme Court in *Public Prosecutor v. Koh Yoke Koon* [1988] 1 CLJ (Rep) 269: The said sections are too clear to admit of any ambiguity and doubt what Parliament intends to do. By the new s. 4C of the said Act A 706 the 1st detention order sought to be impugned is validated. By the terms of s. 7, it is made retrospective covering all detention orders made between the coming into force of the Ordinance and the passing of the new Act A 706. In saying this, I therefore have answered the first part of the contention of learned Counsel for the applicant that Act A 706 does not cover the applicant's situation as it is not made to operate retrospectively.

In saying so, I also answer the second part of his contention that Act A 706 is of no effects, as according to him, it offends Article 7(1) of the Federal Constitution. Article 7(1) of the Federal Constitution reads:

> No person shall be punished for n act or omission which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.

With respect to learned Counsel for the applicant, I am of the view the amendment Act Act A 706 does not offend Article 7(1). The amendment Act did not create an offence but regulated a procedure which says that the period of detention called the transitional period and the detention period covering the journey of the applicant to and from his place of detention is valid.

For reason given, I hold that the 1st detention order of the applicant has been validated by Act A 706.

I deal with the 2nd detention order which has been alleged by the applicant to be invalid. In reply the learned Senior Federal Counsel submitted that like the case of the 1st detention order, the case of *Public Prosecutor v. Koh Yoke Koon* [1988] 1 CLJ (Rep) 269 no longer apply in view of the amendment made to the Act by virtue of Act A 707 also with effect from 15 July 1988. Section 2 of the amending Act creating a new s. 6A reads:

> 6A. No detention order shall be invalid or inoperative by reason:
>
> (a) that the person to who it relates:
>
> (i) was immediately before the making of the detention order detained in any place other than a place of detention referred to in subsection (2) of s. 6;
>
> (ii) continued to be detained immediately after the making of the detention order in the place in which he was detained under s. 3 before his removal to a place of detention referred to in subsection (2) of s. 6, notwithstanding that the maximum period of such detention under subsection (2) of s. 3 had expired; or
>
> (iii) was during the duration of the detention order on journey in police custody or any other custody to a place of detention referred to in subsection (2) of s. 6; or
>
> (b) that the detention order was served on him at any place other than the place of detention referred to in subsection (2) of s. 6, or that there was any defect relating to its service upon him.

In the same manner following the amending act Act A 706 by virtue of s. 4 of Act A 707 provides as follows:

> 4 (1) Where a detention order was made under subsection (1) of s. 6 of the principal Act against any person during the period between the date of the commencement of the principal Act and commencement of this Act (hereinafter referred to as "the transitional period"), the detention order and detention effected in pursuance thereof during the transitional period, and its continuation thereafter, if any, are hereby declared lawful and valid, and shall be deemed to be, and to have always and at all times been, lawful and valid, notwithstanding that at any time during the duration of the detention order he was detained at any place other than the place of detention referred to in subsection (2) of the said s. 6, or continued to be detained in the place in which he was detained under s. 3 of the principal Act after the expiry of the maximum period provided therefor under subsection (2) of the said s. 3, or was on journey in police custody or any other custody to be the place of detention as aforesaid, or that there was any delay in the service of the detention order on him, or that it was served on him at him at any place other than the place of detention, or that there was any defect relating to its service upon him.

As I have decided in the case of the 1st detention order, the amendment Act A 706 validated the 1st detention order similarly in the case of the 2nd detention order, I agree with the learned Senior Federal Counsel that the new s. 6A of Act A 707 has validated the period of detention by the police in Muar Police Station and by virtue of s. 4 of Act A 707 the Act operated retrospectively to make the 2nd detention order a valid order.

In a similar manner for reasons given, I again hold that the 2nd detention order is valid order. That being the position, I therefore refuse to issue the writ of *habeas corpus* as prayed and this application is dismissed.

In passing it is of interest to note that s. 4(2) of the amendment Act A 707 which reads:

> No action, suit, prosecution, or other legal proceeding whatsoever of any description or in any form, shall be brought, instituted or maintained in any Court on any ground after the commencement of this Act or, if brought or instituted before the commencement of this Act, shall continue to be maintained, for or on account of, or in respect of, anything lawfully done in relation to the detention order or the detention declared lawful and valid under subsection (1), save that the provisions of this subsection shall not apply to any such legal proceeding which had concluded and the final decision of the Court in respect of which had been given before the commencement of this Act, or to any appeal in respect of such final decision.

In view of the wordings of s. 4(2) of the Act A707 and if application on a preliminary point has been made by the Senior Federal Counsel inviting this Court to act under s. 4(2) of the Act A 707 to the effect that the applicant could no longer proceed with his application I pose question would the Court have felt disposed to granting the application?

On that note for reasons given, the applicant's application is dismissed.

Also found at [1989] 2 CLJ 877